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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
THE HOUSTON POST COMPANY,
CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER JOURNAL AND
THE LOUISVILLE TIMES),

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 1, 1977.[1]

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[1]The Court of Appeals considered in a single opinion both this case (No. 75-1064) and several companion cases (Nos. 75-1152,

[footnote continued]

OPINIONS BELOW

The opinion of the Court of Appeals (FCC App.[2] 1-60) has not yet been reported. The *Second Report and Order* of the Federal Communications Commission is reported at 50 F.C.C.2d 1046 (1975) and its *Memorandum Opinion and Order* denying petitions for reconsideration at 53 F.C.C.2d 589 (1975) (FCC App. 61-158).

75-1289, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, 75-1618) below. Petitioner Channel Two Television Company is the licensee of television and radio stations in Houston commonly owned with the *Houston Post*, which is published by petitioner The Houston Post Company; petitioners The Chronicle Publishing Company and Chronicle Broadcasting Company commonly own the *San Francisco Chronicle* and television and radio stations in San Francisco; petitioner KSL, Incorporated, is the licensee of television and radio stations in Salt Lake City which are commonly owned with the *Deseret News* through a parent corporation, petitioners The Washington Post Company and Post-Newsweek Stations, Capital Area, Inc., commonly own *The Washington Post* and television and radio stations in Washington. Petitioner WHAS, Inc., is the licensee of television and radio stations in Louisville which are commonly owned with *The Courier Journal* and *The Louisville Times*. All there petitioners were parties in Case No. 75-1064, and some were parties in one or another of the companion cases.

This petition is also supported by The Evening News Association, which owns *The Detroit News* and television and radio stations in Detroit, and The Pulitzer Publishing Company and KSD/KSD-TV, Inc., which commonly own *The St. Louis Post-Dispatch* and television and radio stations in St. Louis. These newspaper-broadcaster cross-owners were parties to the FCC proceeding below but not to the court case.

[2]The FCC has petitioned for certiorari to review the decision involved in this petition and has included the opinions of the court, the report and opinion of the agency in the proceedings below and pertinent provisions of the Communications Act as Appendices A-F filed with its petition. References to these appendices will be cited as "FCC App." Provisions of the Communications Act relied on and not included in the FCC's appendices are set forth in an appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals, which was entered on March 1, 1977, appears at FCC App. 159-60. The Court of Appeals granted a partial stay of its mandate on April 5, 1977 (FCC App. 161-67). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented by the Court of Appeals decision are:

1. Whether the Communications Act requires that newspapers and broadcast stations in the same community which have long been commonly owned must now be broken apart by divestiture without any showing of public harm, and if not, whether a reviewing court may order the Federal Communications Commission to require such divestiture when the Commission has determined that the public interest will not be served thereby.

2. Whether a reviewing court may substitute its judgment for that of the Federal Communications Commission by requiring the Commission to apply retroactively a new licensing policy adopted by the Commission prospectively in the hope of increasing diversity.

STATUTES INVOLVED

Sections 2(a), 4(i), 4(j), 301, 303(g), 309(a) and 309(d)(1) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§152(a), 154(i), 154(j), 301, 303(g), 309(a) and 309(d)(1), are set forth in FCC App. 168-170. Sections 307(a) and 307(d) of that Act, 47 U.S.C. §§307(a) and 307(d), are set forth in the Appendix to this Petition.

STATEMENT

Under the Communications Act of 1934, the Federal Communications Commission is empowered to grant and renew licenses to operate radio and television stations if it finds that public interest, convenience, or necessity will be served thereby. 47 U.S.C. §307(a), (d). The Commission has approved license applications of local newspaper owners under the public interest standard from the very first. Confronted with a scarcity of qualified and willing licensees, the Commission at one time actively encouraged newspaper owners to pioneer radio and later television service in their local communities. As the number of unoccupied frequencies has diminished and the number of qualified license applicants has increased, in choosing among competing candidates for a new station the Commission has come to prefer applicants who do not own a local newspaper, on the ground that they are theoretically more likely to add to the diversity of viewpoints expressed through the media in the market. But the licenses already held by newspaper owners have been consistently renewed if the station's performance has served the public interest and if the licensee has not been guilty of a pattern of abuse of its common ownership or of other improper conduct.

THE ADMINISTRATIVE PROCEEDINGS BELOW

This proceeding began in 1968 with the FCC's proposal to adopt rules proscribing new common ownership of more than one full-time broadcast station in the same market.[3] The proposed rules did not contemplate divestiture of the numerous existing radio-television

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[3] *See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, Notice of Proposed Rulemaking, 33 Fed. Reg. 5315 (1968).

or AM-FM radio combinations. The question of newspaper ownership was not addressed at all.

The proposed prospective ban was adopted as to common ownership of a VHF television station and a radio station in a *First Report and Order* of March 1970.[4] Simultaneously, the Commission issued a further notice of rule-making to consider, *inter alia*, whether this ban should be applied retroactively to existing radio-television combinations, and whether common ownership of a daily newspaper and a broadcast station in the same community ("newspaper cross-ownership") should be similarly proscribed.[5] In its *Second Report and Order*, after a five-year evidentiary proceeding which generated a voluminous record, the Commission decided to adopt the prospective ban on newspaper cross-ownerships, but not to order any divestiture of existing licensees except in communities where the only newspaper and television station, or the only newspaper and radio station in a market not served by a television station, were commonly owned.[6] Its final rules ordered divestiture within five years of 16 newspaper-broadcast combinations, but grandfathered all other existing newspaper cross-ownerships and all radio-television combinations.

The Commission was unable to find in the vast record of studies, evidentiary showings, and comments before it, any substantial public interest problem involving cross-

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[4]*See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970).

[5]Multiple Ownership of Standard, FM, and Television Broadcast Stations, Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339 (1970).

[6]*See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046 (1975) (FCC App. at 61-147), *reconsideration denied*, 53 F.C.C.2d 589 (1975) (FCC App. 148-158).

ownership that called for regulatory relief.[7] There was no showing of any pattern of misuse of commonly-owned media by newspaper cross-owners, either to indoctrinate or censor, or to obtain unfair commercial advantage over competitors. The record did not show any trend of increasing media concentration in local markets.[8] Nor did the Commission find any general lack of diversity of information or points of view or any dearth of independently-owned media sources in most communities.

The Commission nonetheless adopted its prospective newspaper rule because of its determination that, with radio and television now in their maturity and qualified applicants no longer in short supply, "the special reason for encouraging newspaper ownership . . . is no longer generally operative in the way it once was." (FCC App. 90). Recognizing "the changes which have taken place," the Commission decided that "any new licensing should be expected to add to local diversity." (*Id.*). It acknowledged that the expectation of increased diversity of media content attributable to the selection of a licensee unrelated to a local newspaper rested only on "theory," and might be small even where real. (FCC App. 89-91). But because of the importance it attached to diversity as a public interest objective, even a small gain

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[7]The lack of support for such a finding was not due to any lack of participation on the part of advocates of divestiture. Broadscale divestiture was supported not only by such organizations as the National Citizens Committee for Broadcasting, the National Black Media Coalition, the Community Coalition for Media Change, and the National Council of the Churches of Christ, but also by the Antitrust Division of the Department of Justice.

[8]In fact, the record showed that both the percentage and the absolute number of separately-owned newspaper and broadcast media serving individual markets have been increasing, not decreasing, over the years. (FCC App. 88).

of this sort seemed "worth pursuing" where it could be accomplished through prospective rules without disruption of existing service or other substantial public interest costs. (*Id.* 91).

The Commission was unwilling, however, to apply its change of policy retroactively to divest long-established newspaper cross-owners without a showing of some affirmative need for remedial action. The proposal to dispossess these licensees raised not only considerations of fairness (*id.* 89, 93), but also the prospect of deleterious effects on broadcast service from "the disruption and losses which could be expected to attend divestiture." (*Id.* 93-95). The existing licensees as a group had established notable "traditions of service." Most were local owners, long committed to broadcasting in their home communities. In an industry where the Commission had long been concerned about trafficking and the high rate of turnover of broadcast licenses often acquired primarily as investments,[9] the newspaper owners display an unusual continuity of ownership:

> "Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities there is a long record of service to the public." (*Id.* 93).

A Commission study also showed "an undramatic but nonetheless statistically significant superiority in newspaper-owned television stations in a number of program

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[9]See, for example, Applications for Voluntary Assignments or Transfers of Control, 32 F.C.C. 689 (1962).

particulars," including the amount of news, public affairs, and other local programming they carry. (*Id.* 93 n.26, 109-113). Divestiture would deny local communities the service of these licensees, destroy their exceptional continuity, and risk the loss of local ownership as well.

To justify consequences such as these, the Commission said it would require a stronger showing than "just theory or narrowly drawn balances." (*Id.* 91). The Commission found a sufficiently stronger showing, prima facie, in markets where newspaper cross-owners faced no "full-fledged" independently-owned mass media competition providing full coverage of local affairs. (*Id.* 96). But absent such an "effective monopoly" (*id.*) of newspaper and broadcast media, the Commission concluded that divestiture for the sole purpose of maximizing the theoretical quantum of diversity in each market would not serve the public interest.

THE COURT OF APPEALS DECISION

In the Court of Appeals, no party disputed the decision not to divest existing radio-television combinations. However, besides the numerous petitions challenging the prospective newspaper ban and the limited newspaper divestiture order, two parties challenged the decision to grandfather most existing newspaper cross-ownerships. Both the Antitrust Division of the Justice Department and the National Citizens Committee for Broadcasting ("NCCB") focused their attacks specifically on television-newspaper combinations. In fact, the Antitrust Division has not sought general divestiture of radio-newspaper combinations at all.

The court's horizons are not so limited. The court not only invalidates the Commission's grandfather rules. It affirmatively requires a general divestiture of newspaper cross-ownerships, for radio and for television alike.

It holds that the Commission is bound by "a presumption against cross-ownership" and on remand must follow a "policy of giving diversity of media ownership controlling weight." (FCC App. 56-57, 167). Accordingly, having affirmed the prospective ban on *new* newspaper cross-ownerships, it orders the Commission on remand "to ensure that *everyone* [will] be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure . . .)." (*Id.* 167) (emphasis added).

This extraordinary holding is not based on any dispute with the Commission's conclusion "that the factual case for broad-scale divestiture had not been made." (*Id.* 47). The court finds the record "essentially inconclusive" as to any actual negative effects on the public interest attributable to newspaper cross-ownership in general or to existing cross-ownerships in particular. (*Id.* 49). Therefore, it says the question before the Commission turned "primarily on policy, not factual considerations." (*Id.* 38, footnote omitted).

As a matter of policy, the court holds that the Commission erred "in refusing to order divestiture in the absence of a showing of tangible public interest harm." (*Id.* 50). In the court's view, the Commission should have adopted a "presumption that cross-owned stations do not serve the public interest." (*Id.* 51). This presumption is said to find "support" in the Commission's obligation under the Communications Act to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. §303(g), in the "policies of the First Amendment" favoring diversity, and "perhaps most importantly, [in] the Commission's long-standing policy . . . that diversification of media sources is of central importance." (App. 51, footnote omitted).

On the question of retroactive application of the Commission's new cross-ownership policy, the court

notes that, under the Communications Act, broadcast licensees have no "vested right" in their licenses, and may be denied renewal if the Commission determines that the public interest so requires. (*Id.* 50). In a subsequent footnote, the court says that considerations of fairness to existing licensees are "impermissible," since "[l]icensing is to be in the public, not private interest." (*Id.* 55 n.101).

The court disparages each of the Commission's other countervailing policies and values as unpersuasive or unimportant. The policy favoring local ownership is dismissed as "of little concern to the Commission" (*id.* 52); in any event, the court finds no reason to suppose that local ownership will be reduced by divesting the licensees of newspaper cross-owners. (*Id.* 53). The court decides that the loss of the unusual continuity of operation provided by newspaper cross-owners is of little if any significance. It discounts the Commission's findings that existing newspaper-related television stations have superior programming, because "the Commission did not *stress* this superiority in deciding to grandfather most stations," and because "comparing amounts of programming types aired . . . would . . . seem to be a crude measure of the public interest." (*Id.* 39-40) (emphasis added). The court also advances other arguments against the Commission's policies, but the foregoing are representative of the nature and tone of its debate with the Commission.

All these Commission policies, the court concludes, are "lesser policies" than diversity. (*Id.* 57). In addition, they are not supported by factual showings in the record that breaching them would entail actual harm to the public interest. (*See* FCC App. 48-49, 56-57). "In sum, the Commission could not have rationally concluded that [they] . . . justified grandfathering absent a show of harm," or that "their potential impairment overcame the

presumption against cross-ownership." (*Id.* 56-57, footnote omitted). Divestiture is therefore required except in special cases "where the evidence clearly discloses that [a] cross-ownership is [affirmatively] in the public interest," and the Commission is instructed to adopt a divestiture rule on remand, subject to a waiver provision for the exceptional cases. (App. 60, 167).

REASONS FOR GRANTING THE WRIT

The court's holdings that the Commission is required to give "controlling weight to diversity," and to apply its new cross-ownership policy retroactively to divest meritorious licensees without any showing that they have harmed the public interest, are without precedent. They reverse long-standing Commission policies, without any warrant in the statute or the decided cases. They substitute judicial judgment for agency judgment in balancing public interest considerations. They override the fundamental bias of the legal system against retroactive law-making. The court has dictated not only the result but even the substance of the rule that the agency is to adopt on remand. It has in all these respects departed radically from the proper role of an appellate court in reviewing agency rulemaking, as defined by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The departure is so extreme and so unfounded as to call for the exercise of this Court's power of supervision.

The decision is important because of the potential sweep of the controlling presumption it erects against existing cross-ownership, as well as for its impact on the law. Its immediate application is to require restructuring of the broadcast industry on a nationwide scale, through

the forced sale of properties in over 50 television markets and the forced breakup of some 160 newspaper-radio combinations. The future consequences may be far greater. Common ownership of multiple local media of various kinds is commonplace. The radio-television cross-ownerships all grandfathered in the agency proceeding below appear to have escaped the court's divestiture decree in this case only because no party thought to appeal the decision to grandfather them. The Commission has also grandfathered cross-ownerships of television and cable systems approved prior to adoption of a prospective ban, on the very principles the court rejects as irrational. In addition, there are large numbers of AM-FM radio cross-ownerships, which the Commission has not banned even prospectively. If the court's presumption against cross-ownership stands in this case, notwithstanding the special equities and merit of the newspaper cross-owners as licensees, nothing in its opinion suggests that it would look differently on these other established cross-ownerships standing in the way of the court's policy of maximum feasible diversification. The court's unprecedented assertion of authority should be checked at the outset.

Under the Communications Act of 1934, the Commission is charged with the legislative responsibility for giving content to the statutory standard of public interest, convenience or necessity. The role of the courts in the substance of such legislative policy judgments is only "to correct errors of law" which the Commission may have made in reaching or articulating its judgment. *FCC v. Pottsville Broadcasting Co., supra,* 309 U.S. at 145; K. Davis, *Administrative Law of the Seventies,* §29.01 (1976). Otherwise, in reviewing an FCC rulemaking under the "arbitrary and capricious" standard of §706(2)(A) of the Administrative Procedure Act, the court's role is to determine that the agency's action is

rational and "based on a consideration of the relevant factors." *Citizens of Overton Park v. Volpe, supra,* 401 U.S. at 416; *Bowman Transportation Co. v. Arkansas-Best Freight Systems, supra,* 419 U.S. at 290 (1974); *see also Ethyl Corp. v. EPA,* 541 F.2d 1, 34 (D.C. Cir. 1976). "The court is not empowered to substitute its judgment for that of the agency." *Citizens of Overton Park v. Volpe, supra,* 401 U.S. at 416.

In this case, the court instructed the Commission that it must approach the question of divestiture with a "presumption against [continued] cross-ownership." (FCC App. 56-57). The Commission has repeatedly found, in triennial license renewals, that the newspaper cross-ownerships in question are consistent with the public interest. The court-imposed presumption thus requires the Commission to presume that its longstanding policy is wrong. Such a reversal on the merits of established Commission policy could be within the court's authority only if required by applicable law.

The court contends that its presumption is grounded in the Communications Act and "First Amendment policies." But newspaper cross-ownership has been permitted under the Communications Act throughout the 43 years since its enactment.[10] In all that time, no court has suggested that the Act, much less anything in the First Amendment, forbids cross-ownership or compels any presumption against continued licensing of previously approved cross-ownerships which have served the public well. If the Court of Appeals has now uncovered a long-unnoticed requirement of the law, this belated discovery presents an important federal question which has not been, and now should be, reviewed by this Court.

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[10] *See, e.g.,* Pinellas Broadcasting Co. v. FCC., 230 F.2d 204 (D.C. Cir.), *cert. denied,* 350 U.S. 1007 (1956).

Absent such a requirement of law, the court's imposition of a controlling presumption against continued cross-ownership usurps the public interest responsibilities which Congress delegated to the Commission. The court seeks to justify its reversal of Commission policy as compelled by the Commission's own "diversification policy" applicable to comparative licensing proceedings involving applicants for new licenses, where the Commission prefers applicants who will add a new media owner in the market over those who already own a local medium. Although the court was confused on the point, this policy is not and never has been applied by the Commission to meritorious incumbent licensees.[11] In renewal proceedings involving such licensees, the Commission takes the position that a record of proven meritorious service in the public interest may be controlling.[12]

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[11]The court apparently meant to state that the Commission applies the 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), in a renewal context (FCC App. 10 n.9, 52 n.94), although typographical errors make its meaning ambiguous. In any case, the Statement in fact has been applied only to the introduction of evidence, but not to the weighing of competing considerations in the final decision, in renewal cases involving a meritorious incumbent. See Seven (7) League Productions, Inc., 1 F.C.C.2d 1597, 1598-99 (1965); *accord* Belo Broadcasting Corp., 47 F.C.C.2d 540, 544 (1974). Thus, in Greater Boston Television Corp. v. FCC., 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), 406 U.S. 950 (1972), a renewal applicant was treated like a new applicant only because "unique events and procedures . . . place[d] WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." 444 F.2d at 849, 854. The court indicated, however, that in a conventional renewal case involving an incumbent with a meritorious record it would have been inappropriate to have given diversity controlling weight. *See* 444 F.2d at 854.

[12]*See* Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing

[footnote continued]

Ironically, the Commission itself could not have adopted the court-imposed presumption against continued cross-ownership without explaining why so drastic a change in its policy is required.[13] Yet the court does not suggest that any change of circumstances compels or supports the policy reversal. On the contrary, it accepts the Commission's conclusion that the record below does not present a factual case for divestiture. The Commission explained its prospective policy change—foreshadowed by its pre-existing policy of disfavoring competing applicants for new facilities if they have newspaper or other local media affiliations—partly on the ground that there is no longer a special need for newspapers to act as broadcast pioneers in their local markets and partly in terms of a policy to maximize diversity where it can do so without divestiture. Those rationales obviously do not support a new policy of required divestiture. The court has thus imposed on the Commission a policy change which the Commission, without more, could not lawfully have reached.

As this anomoly reveals, in substance the court has simply disagreed with the Commission's priorities and

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Process, Docket No. 19154, Report and Order, April 7, 1977, FCC 77-204, ___ Fed. Reg. ___; Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970); Greater Boston Television Corp. v. FCC, *supra*, 444 F.2d at 854 (D.C. Cir. 1970). The 1970 Policy Statement on Comparative Hearings, *supra*, was struck down in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), on the ground that the procedures it mandated were defective. However, the court in *Citizens* noted that "incumbent licensees should be judged primarily on their records of past performance." 447 F.2d at 1213.

[13] Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206, *cert. denied*, 350 U.S. 1007 (1956).

imposed its own public interest judgment instead. The court does not suggest that the Commission failed to take account of relevant factors. The Commission gave expansive recognition to the importance of diversity as a public interest value in adopting its prospective ban without any affirmative showing of need. It articulated rational reasons, grounded in established Commission policies, for not ordering general divestiture in the absence of such a showing. Although the court characterizes the decision to grandfather as irrational, its argumentative debate with the Commission's reasons for not requiring divestiture does not show that the Commission's concerns are unintelligible or unfounded, but only that in the court's view they all serve "lesser policies" than diversification of broadcast ownership. In short, this is a textbook case of a court's "substitut[ing] its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 416.

Moreover, in two respects the court carries this basic error beyond the textbook model. First, it holds that the Commission could not rationally require a stronger showing to support retroactive application of its new policy toward newspaper cross-ownerships than for the prospective rule. Second, having re-balanced the public interest considerations underlying the Commission's grandfather rule, the court not only vacates the rule but instructs the Commission to adopt a new rule codifying the court's balance.

1. The extent of the court's intrusion on the Commission's public interest discretion is most apparent in its insistence that the Commission must give its change of policy toward newspaper cross-ownerships full retroactive effect. The Commission decided that it should eschew retroactive application except in a class of so-called "egregious" cases where it concluded there was

an affirmative public interest need. The court holds that it is irrational for the Commission to distinguish between prospective and retrospective application.

In so holding the court invalidates yet another long-established Commission policy. The Commission, in changing policies, has frequently grandfathered previously approved non-conforming arrangements or otherwise distinguished between prospective and retroactive applications.[14] It has done so specifically in establishing new rules and policies to promote diversification of ownership.[15] The distinction is expressly incorporated in existing FCC multiple ownership rules.[16] In some cases the Commission has expressly referred to the "inherently disruptive consequences of divestiture";[17] in many it has grandfathered without any such reference.

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[14] *E.g.*, Revision of FM Broadcast Rules, 23 P&F Radio Reg. 1801, 1831-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); Cable Television Report and Order, 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems).

[15] *See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964); Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964); Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965); Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501, 1507 (1968); Multiple Ownership of Standard, FM & TV Broadcast Stations, 22 F.C.C.2d 306 (1970).

[16] 47 C.F.R. §§ 73.35 n.8, 73.240 n.8, and 73.636 n.8.

[17] *E.g.*, FCC Report on Chain Broadcasting (Order No. 37, Dkt. No. 5060 (1941) at 67; Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 789 (1966); Diversification of Control of CATV Systems, 23 F.C.C.2d 833, 835 (1970).

No court until now, to our knowledge, has held that grandfathering requires any special justification.[18] As this Court has recognized, the freedom to change course on a prospective basis only without prejudice to established expectations based on prior policy is an essential tool in the legislative process of Congress and agencies alike. *United States v. Maher*, 307 U.S. 148, 153 (1939). Prospective rules permit the legislator to respond to "the felt need for regulating . . . through familiar administrative devices, while at the same time . . . [satisfying] the dictates of fairness by affording sanction for enterprises theretofore established." *Id.; see also Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 227-28 (D.C. Cir. 1967).[19]

The court's inexplicable assertion that fairness to private parties may not be considered as an element of the public interest (FCC App. 55 n.101) runs counter to the grain of the fundamental bias against retroactive law-making rooted in the common law and the concept of due process.

> "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." Story, *Constitution*, §1398 (1898).

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[18] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 206-07 (1943); Committee for Open Media v. FCC, 533 F.2d 1 (D.C. Cir. 1976); Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 324 (D.C. Cir. 1974); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 227-28 (D.C. Cir. 1967); Storer Broadcasting Co. v. United States, 240 F.2d 55, 56 & n.3 (D.C. Cir. 1956); Jefferson Standard Broadcasting Co. v. FCC, 297 F.Supp. 784, 785-86 (W.D.N.C. 1969).

[19] When an agency acts prospectively, it has broad discretion to experiment, innovate, or change direction. *See* Frontier Airlines v. CAB, 439 F.2d 634, 640 (D.C. Cir. 1971); Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835, 837-38 (D.C. Cir. 1962); American Airlines v. CAB, 192 F.2d 417 (D.C. Cir. 1951).

Where such laws are not unconstitutional,[20] they are nonetheless disfavored. If statutes are ambiguous as to whether they are to apply retroactively, they are "presumed, in the absence of clear expression to the contrary, to operate prospectively." *Hassett v. Welch*, 303 U.S. 303, 314 (1938); *Claridge Apartments Co. v. Comm'r*, 323 U.S. 141, 164 (1944); *Place v. Weinberger*, 497 F.2d 412, 414 (6th Cir. 1974). And to avoid retroactivity, agencies are expected insofar as possible to make policy through the "quasi-legislative promulgation of rules to be applied in the future," rather than by adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

In some cases, the courts have forbidden agencies to give retroactive effects to a new rule, on the ground that to do so would be unfair.[21] The court decides, in view of the limited rights of a broadcast licensee in its license, that this is not such a case.[22] It says that "the contention that divestiture contains elements common to suspect retroactive legislation goes not to the existence of Commission authority, but rather to the reasonableness of its exercise." (FCC App. 34, footnote omitted). But having concluded that the Commission is *not required* to grandfather absent evidence of harm, (*id.* at 34, 50), the court never explains why the Commission is *required not* to do so. By denying the Commission the discretion

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[20] *E.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Coombes v. Getz, 285 U.S. 434 (1932).

[21] *See, e.g.*, Retail, Wholesale, and Dept. Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); NLRB v. E&B Brewing Co., 276 F.2d 594, 600 (6th Cir. 1960).

[22] In so deciding the court disregards the well-established reasonable expectancy of renewal of a licensee with a record of meritorious service. Greater Boston Television Corporation v. FCC, *supra*, 444 F.2d at 854; Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 n.9 (D.C. Cir. 1976).

enjoyed by all other agencies to act on the "premise that divestiture, as retroactive legislation, is inherently suspect" (FCC App. 33), the court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."[23]

2. The court has also gone to the extraordinary length of dictating to the Commission the result it must reach on remand. By affirming the Commission's prospective ban and requiring the Commission to apply the standard of that rule consistently to existing cross-owners, the court has denied the Commission the elementary prerogative of itself making the final assessment of what the public interest requires in light of the purported legal errors identified by the court. The court thereby contravenes the basic principle of appellate review that administrative public interest determinations, unless mere formalities, may be made only by the agency, and not by a reviewing court. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), *NLRB v. Food Store Employees Union*, 417 U.S. 1, 8-9 (1974). And it directly conflicts with this Court's teaching in *FCC v. Pottsville Broadcasting Co., supra.*

In *Pottsville*, the Court of Appeals once before sought to go beyond identifying Commission error and to impose a final result. This Court reversed an order directing the Commission to accept the court-imposed result. A reviewing court, it said

> "may . . . correct errors of law and on remand the Commission is bound to act upon the correction. [Citations omitted]. But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the

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[23]Supreme Court Rule 19.

> administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." [Citation omitted.]. 309 U.S. at 145.

Once the court had identified the legal error in what the Commission had done, it had

> "exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of 'public interest, convenience or necessity' . . . The Court of Appeals cannot write [its views] . . . into the statute as an indirect result of its power to scrutinize legal errors. . . . Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute." *Id.*

The rule confining a reviewing court's role to identification of legal error, besides preserving the "integrity of the administrative process,"[24] protects against the possibility that law will be made on the basis of a court's misapplication or misunderstanding of agency policies, or an inadequate consideration of the relevant public interest factors by the agency, or a mere failure of articulation or explanation in an agency opinion. If the agency is not given a chance to repair such non-legal mistakes, whether the court's or its own,

> "the contingencies of judicial review and litigation, rather than the public interest, would be decisive factors. . . ." *FCC v. Pottsville Broadcasting Co., supra*, 309 U.S. at 145-46.

In the present case, this danger is more than academic. The court misconstrues the agency's diversification policy, elevating diversity from an important public

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[24]NLRB v. Food Store Employees Union, *supra*, 417 U.S. at 9.

interest factor into a virtually irrebuttable presumption. That aside, its denigration of the Commission's concerns about losing the public benefits of the unusual continuity and the local ownership provided by the existing newspaper cross-owners as a group reflects a misunderstanding of the Commission's policies.[25] In holding the Commission bound by its alleged failure to state satisfactory reasons for not "giving diversity of media ownership controlling weight" (FCC App. 167), the court imprisons the Commission in any inadequacies of its opinion writer and writes the court's misunderstanding of Commission policies into law.

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[25]For example, the court's arguments that "a one-time alteration in the ownership structure of the broadcast industry should not effect [sic] the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity," and that the concern for continuity "is at odds with [the Commission's] practice of routinely approving license assignments" (FCC App. 54), reveal the court's unfamiliarity with the Commission's continuity policy as previously articulated and applied. The Commission has long been concerned about the "important public interest question of whether numerous communities throughout this country are being deprived of the benefits which we [the Commission] believe, based upon our experience, come from sustained station ownership." Applications for Voluntary Assignments or Transfers of Control, 32 F.C.C. 689, 690 (1962). Because of its "great concern" at the high rate of turnover of broadcast licenses, the Commission adopted a rule requiring a full hearing to justify any license transfer during the first three-year license term. 47 C.F.R. §1.597 (1976); Notice of Proposed Rulemaking, 25 Fed. Reg. 12898 (1960). The Commission has not thought it wise to lock in licensees who do not wish to continue after three years, but the fact that a substantial turnover is therefore still allowed accentuates rather than diminishes the importance of preserving exceptional continuity where it is found. The Commission has reason to believe that the "one-time" disruption of continuity a general divestiture would entail involves more than a temporary loss while the new owners acquire experience in broadcasting to the local community: the record shows that new licensees who do not own newspapers are far less likely to make comparable long-term commitments.

The court's plain error presents the same occasion for this Court's review as did the same error of the same court in *Pottsville*, and *NLRB v. Food Store Employees Union, supra*. Here, the error is presented in the context of a much broader departure from the accepted limitaon the scope of appellate review. This Court's review, and restraint, is required.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151 *et seq.*

§307. Licenses; allocation of facilities; terms; renewals.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition

of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.